No. 78-257

In the Supreme Court of the United States

OCTOBER TERM, 1978

BURNETTE-CARTER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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The government brought this action to recover damages for the conversion of property in which it held a security interest (Pet. App. A-8). Petitioner, a commission livestock broker, contends that the court of appeals erred in holding that the government's security interest in the property petitioner sold on behalf of the debtor was perfected.

1. Pursuant to its authority under 7 U.S.C. 1941 *et seq.*, the Farmers Home Administration (FmHA) executed three loan agreements with George T. Johnson, for a total of $33,670 (Pet. App. A-2). To secure this indebtedness, Johnson executed three security agreements, covering, *inter alia*, all the livestock that he then owned or would later acquire (*id.* at A-3). These agreements were executed in Mississippi, where the

property was located, and financing statements were filed in the Office of the Chancery Court Clerk for DeSoto County, Mississippi (*ibid.*). The FmHA's security interests became perfected under state law at the time of filing. See Miss. Code Ann. §§ 75-9-302, 75-9-303 (1972).

Without the knowledge or approval of the FmHA, Johnson delivered 87 head of cattle covered by the security agreements to the South Memphis Stock Yards in Memphis, Tennessee (Pet. App. A-3). The cattle were consigned to petitioner, which sold them at auction for a total of $16,484.06 (Pet. App. A-3, A-9). These sales were completed within four months of the time the cattle were shipped into Tennessee (*id.* at A-9).

Johnson did not apply the sale proceeds to the satisfaction of the indebtedness, and he defaulted on his loan repayments (*id.* at A-3, A-9). Eventually the FmHA liquidated the remaining security and applied the proceeds to the indebtedness, leaving a balance of $15,489.50 outstanding (*ibid.*).

2. The United States then filed this action alleging that petitioner had converted property (the 87 head of cattle covered by the FmHA security agreements) and seeking damages in the amount of the proceeds of the sale (*id.* at A-3).

Finding no dispute about the facts of the case, the district court granted petitioner's motion for summary judgment. The court concluded that under Tennessee law, Tenn. Code Ann. § 47-9-103(3) (1964),[1] because the government's out-of-state security interest was not

[1]Tenn. Code Ann. § 47-9-103(3) (1964), and the statute in force at the time of the events in question, Miss. Code Ann. § 75-9-103(3) (1972), are almost identical to § 9-103(3) of the Uniform Commercial Code (1962 version). The Mississippi statute was subsequently amended, see note 3, *infra*.

reperfected in Tennessee within four months after the covered property was brought into the state, it was inferior to interests subsequently acquired in Tennessee (Pet. App. A-5 to A-6).

The court of appeals reversed, holding that the government's security interest was valid even though it had not been reperfected in Tennessee (*id.* at A-8 to A-18). The court of appeals observed that the parties agreed that if the FmHA's security interest was valid at the time and place of sale, then petitioner is liable in conversion, whether or not it had knowledge of the security interest (*id.* at A-10). The court held that the validity of the FmHA's security interest is governed by federal law, and it concluded that the Uniform Commercial Code is the source of the relevant federal common law (*id.* at A-11 to A-13). Following the weight of the authority interpreting U.C.C. § 9-103(3) (1962 version), the court held that a security interest perfected in one state remains valid for four months, even if not reperfected in the state to which the security is removed.

3. Petitioner urges (Pet. 5-7) that the Court should grant review to resolve a conflict among the circuits on the question whether federal or state law controls the validity and priority of government security interests. Compare *United States* v. *Carson*, 372 F. 2d 429, 431-435 (6th Cir. 1967), and *United States* v. *Hext*, 444 F. 2d 804 (5th Cir. 1971), with *United States* v. *Chappell Livestock Auction, Inc.*, 523 F. 2d 840 (8th Cir. 1975). But the asserted conflict provides no justification for granting review in the instant case because the choice of law question is irrelevant.[2] Although the court of appeals applied federal

[2]The Court has granted review in two cases that involve the priority of federal and state liens. *United States* v. *Kimbell Foods, Inc.*, cert. granted, No. 77-1359 (May 15, 1978); *United States* v. *Crittenden*, cert. granted, No. 77-1644 (Oct. 2, 1978). Both cases come from the Fifth Circuit, and in both the court of appeals held, following

law, it concluded that the federal common law should be drawn from the Uniform Commercial Code, which has been adopted in 49 states. The court applied the 1962 version of U.C.C. § 9-103(3) that was in force in both Mississippi and Tennessee at the time of the events in question, and in interpreting that provision the court followed the overwhelming weight of authority (Pet. App. A-15 to A-16 & nn.8-11). There is no reason to suppose that the courts of Mississippi and Tennessee, applying state law, would reach a conclusion other than the one reached by the federal court.

Alternatively, petitioner urges (Pet. 7-9) that review is warranted to correct the court of appeals' erroneous construction of § 9-103(3). But the court of appeals' decision is in accord with the substantial weight of authority (see Pet. App. A-14 to A-16). In any event, this question does not warrant review by this Court. As petitioner points out (Pet. 9; see Pet. App. A-18), a clarifying amendment to § 103 that disposes of the question petitioner presents was proposed in 1972 by the U.C.C. Permanent Editorial Board and has already been adopted by more than 20 states.[3] Accordingly, the question is one of little prospective importance.

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overwhelming precedent, that federal law controls questions of priority. Petitioner's argument (Pet. 5) that the decision here conflicts with the rule prevailing in the Fifth Circuit therefore is incorrect. There is no need, however, to hold the present petition pending the disposition of *Kimbell Foods* and *Crittenden*. Neither of those cases presents the question whether state law controls, and, for the reasons stated in the text, that question is immaterial even in the present case.

[3]Tennessee has not adopted this amendment. Mississippi enacted the clarifying amendment in 1977, to be effective beginning April 1, 1978. Miss. Code Ann. § 75-9-103(3)(e) (1978 Supp.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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